

number of additional programs.^{23/} Elimination of syndex alone, however, would benefit network affiliates, which are usually the strongest stations, while depriving weaker independent stations of comparable exclusivity rights. Such a result further militates against reliance on one isolated passage in the Act's legislative history.

Viacom urges the FCC to recognize that, despite the Senate Report language discussed above, the network non-duplication and syndex rules, if unchanged, will be inconsistent with the Senate Bill's regulatory structure when applied together with the Act's retransmission consent provisions, and can only be made consistent with that regulatory structure if they are amended to be inapplicable to uncarried consent stations. Consequently, Viacom submits that the FCC may safely disregard a single paragraph in a Committee Report that raises an issue not discussed either in the Act or elsewhere in the Act's legislative history in order to effectuate Congressional intent as reflected elsewhere in the Act and its legislative history.

^{23/} Any such substitution would in most instances result in prohibitive copyright compulsory license fees. Most cable systems already carry the maximum number of distant signals permitted under the base rate compulsory license fees (ranging from 0.893% to 0.265% of a cable system's gross receipts from carriage of broadcast signals). Carriage of distant signals that do not qualify for the base rate fees is at the penalty rate of 3.75% of gross receipts from the carriage of broadcast signals (and one-quarter of that amount for carriage of distant signals ABC, CBS and NBC affiliates).

3. A Television Station's Retransmission Consent Election Should be Applicable to All Cable Systems in the Station's Arbitron ADI Market.

The Act is not clear about the extent to which a station's election between must-carry and retransmission consent applies to multiple cable systems serving the station's ADI. Section 325(b)(3)(B) states that "[i]f there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems."

Drawing on language in the Senate Report, the FCC has concluded that Congress intended the phrase "the same geographic area" to mean that a station's election will only apply to those cable systems whose service areas directly overlap. NPRM at ¶ 45. That narrow interpretation of the term "same geographic area" is not compelled by the Act's legislative history. At one point the Senate Report states that "[t]he bill provides that a broadcaster's election with respect to one cable system will apply to any so-called overbuild systems which serve the same geographic area." Senate Report at 38. However, the Senate Report does not state that that is the only situation where cable systems can be deemed to serve the same geographic area, and indeed later in the Senate Report the "same geographic area" provision of the Senate Bill is described as applying "where there are competing cable systems serving one geographic area." Id. at 83. Cable systems compete even where there are no overbuilds because subscribers and franchising authorities, when considering the performance of their own cable systems, measure

that performance at least in part by the performance of other nearby cable systems.^{24/} Franchising authorities are particularly likely to measure one system's performance by that of another nearby system if both systems are owned by the same cable operator. Furthermore, the Act's provision which prohibits the award of exclusive franchises and prohibits franchising authorities from unreasonably refusing to award an additional competitive franchise (47 U.S.C. Section 541(a)(1)) has the very real effect of making competitors of all nearby cable systems, since nearby cable operators, either on their own initiative or at the urging of disgruntled franchising authorities, can readily seek to serve areas where an incumbent cable system's services may not be comparable to those of nearby systems. Viacom therefore believes that the FCC has the discretion to interpret the "same geographic area" language in the Act more broadly than it has in the NPRM. For the reasons set forth below, Viacom urges the FCC to do so and require a local television station's must-carry/retransmission consent elections to be made on a market-wide basis.

In adopting the "same election" requirement, Congress recognized that, without such a provision, a station could elect

^{24/} For example, a Viacom subsidiary is one of three entities holding non-exclusive franchises to provide cable service to the City of Seattle. Although the three entities do not serve substantially the same areas of the city, their respective service areas overlap to a limited extent and are close enough that the Seattle franchising authority may seek to evaluate the performance of each system on a comparative basis.

must-carry on one system and then use that election as leverage in retransmission consent negotiations with a second system. That leverage clearly will exist in overbuild situations, but it also will exist when stations make different elections on nearby systems even if their service areas do not overlap. A station could, for example, selectively elect must-carry on a number of geographically dispersed systems throughout its market. The remaining systems would likely face numerous complaints from their subscribers and franchising authorities if they do not carry the signal being carried on the neighboring systems where the station has elected must-carry. To avoid such complaints (and their potential impact on franchise renewal or the possibility of franchising authorities seeking out an overbuilder), systems on which the station has requested retransmission consent will be under severe pressure to yield to the local station's terms for retransmission consent.

Thus, the FCC's narrow interpretation of "same geographic area" will result not in the hard bargaining between stations and systems that may result in equitable retransmission consent agreements, but in gamesmanship whereby stations can unfairly enhance their bargaining position for retransmission consent by selectively electing must-carry in a manner that puts the most pressure on the cable systems that are of most importance to the stations. Viacom does not believe that Congress intended the election process to be used in this manner. Such a result can best be avoided by requiring stations to make their

must-carry/retransmission consent elections on a market-wide basis.

For cable system owners like Viacom, who operate cable systems in multiple communities in several television markets, different carriage complements resulting from different must-carry/retransmission consent elections in the same market can also adversely impact subscribers. For example, there are a number of technical developments now being implemented or which will soon be implemented by cable systems, such as addressability, compression, advanced television services (e.g., high definition television), two-way operation, and the like. Many of these developments require a large subscriber base in order to be economically feasible, at least in the near term. Viacom and other cable operators have, over the years, been gradually integrating their closely situated cable systems, in part to provide the subscriber base needed to implement these and other developments. Presumably, where that integration is complete (except possibly with respect to local origination and access channels), the communities involved will be treated as served by a single system subject to one must-carry/retransmission consent election. But where integration is only partial or has not commenced, different elections by stations could delay or prevent further technical integration and many of the attendant system improvements and new services. The requirement of a market-wide election would eliminate this impediment to improved services to subscribers.

The FCC should therefore recognize that the "same geographic area" language in the Act can be interpreted more broadly than as applying only in overbuild situations. The retransmission consent provisions of the Act will be better effectuated, and cable subscribers will be better served, if the FCC determines that for purposes of the must-carry/retransmission consent election, all cable systems in an ADI serve the "same geographic area." If, however, the FCC elects not to interpret the Act in this manner, Viacom requests that the FCC adopt a rule requiring a local commercial television station to make the same election with respect to all commonly owned systems in its ADI. Applying the "same election" requirement to commonly owned systems will facilitate the technical integration and related service benefits discussed above without materially affecting the economic interests of local stations.

Finally, Viacom urges the FCC to consider that many cable systems (particularly those in larger markets) employ microwave interconnection extensively, and that in some cases there may be an issue as to whether a system's microwave hubs are integrated with the headend sufficiently enough to be considered part of the same "system" under the FCC's must-carry rules. Hence, Viacom requests that if the FCC ultimately decides to require local stations to make the same election only with respect to directly overlapping systems, it should declare that all microwave receive sites and the areas served from those receive sites will be considered part of the same cable system if they receive by

microwave 75% of all local televisions signals^{25/} from the same microwave hub and any interconnected hubs.^{26/}

- B. The FCC Should Require a Local Commercial Television Station, as a Condition to Exercise of Retransmission Consent Rights, to Provide a Cable System with a Written Certification of Its Express Authority to Grant Retransmission Consent and Declare that Cable Systems that Rely on Such Certifications Have All Authority Required Under the Act for Retransmission Consent.

In the NPRM, the FCC states that "[W]hen a cable system must have 'the express authority of the originating station' to retransmit its television signal, we propose to require that such authority be conveyed in writing." NPRM at ¶ 57. Viacom firmly supports the FCC's position that any retransmission consent agreement between the originating station and a cable system must be in writing.^{27/} A cable operator will, however, in most circumstances be reluctant to enter into a written retransmission

^{25/} This standard treats systems as technically integrated based upon technical integration of the signals that are the subject of must-carry and retransmission consent -- local signals. It permits systems that desire a level of separation (for redundancy or other purposes) to have some flexibility to configure their systems with, for example, separate earth stations for reception of satellite-delivered programming, without losing the benefit of the "same election" requirement applicable to integrated systems.

^{26/} Cable systems operated by Viacom's subsidiaries in the Seattle and Everett, Washington, areas are technically integrated through the use of two microwave hub sites rather than one. At some point in the future, they could also be technically integrated with a cable system operated by another Viacom subsidiary in the Tacoma, Washington, area.

^{27/} Written agreements will facilitate record keeping and eliminate disputes about the scope of the consent (e.g., whether the agreement covers carriage of the entire program schedule, line 21 closed captioning, transmissions in the vertical blanking interval, etc.).

consent agreement if it is uncertain as to whether the originating station has the authority to grant retransmission consent and/or if there is a possibility that the operator could be drawn into a lawsuit between the station and its video programmer about that issue. Hence, Viacom requests that the FCC require the originating station to certify in the retransmission consent agreement that it has express authority to grant retransmission consent from every video programmer from whom it obtains programming.^{28/} Further, Viacom also requests that the FCC declare that any cable system that relies on such certifications has all authority required under the Act for retransmission consent with respect to any programming covered by such certifications and that any such cable system will have no liability in any legal action resulting from or in connection with the originating station's grant of retransmission consent to the cable operator. Adoption of these proposals will expedite the negotiation of retransmission consent agreements between

^{28/} The FCC has already recognized the value of certifications in its pending rule making with respect to indecent and obscene programming on leased access and public, educational and governmental ("PEG") channels. Notice of Proposed Rule Making (Indecent Programming and Other Types of Materials on Cable Access Channels), FCC 92-498, MM Docket No. 92-258 (released November 10, 1992) ("Indecency NPRM"). There, the FCC assumes that cable operators, in view of their criminal and civil liability for obscene programming, may require leased access program providers to certify that their programming is not obscene. Indecency NPRM at ¶ 11. The FCC also relies on certifications in other contexts. See, e.g., 47 C.F.R. Section 73.661(c) (Television networks required to certify annually to their compliance with various aspects of the FCC's financial interest and syndication rules).

originating stations and cable operators, while insulating cable operators from any legal actions relating to the originating station's grant of retransmission consent.^{29/}

- C. The FCC Should Declare That a Local Commercial Station May Not Grant Retransmission Consent Unless Its Programming and/or Network Affiliation Contracts Expressly Allow It to Do So and that One Need Only Look to the Contracts the Station Has Entered Into with its Video Programmers to Determine Whether the Station Has Authority to Grant Retransmission Consent.

The FCC requests comment on whether Section 325(b)(1)(A) should be interpreted as enabling an originating station to grant retransmission consent in the absence of an express contractual arrangement if it does not have authorization to do so from copyright holders. NPRM at ¶ 65. Section 325 does not refer to "copyright holders." Rather, it says that nothing in Section 325(b) will be construed as "affecting existing or future programming licensing agreements between broadcasting stations and video programmers." As Congress recognized, a station need only deal with the party with whom the station contracts for programming, normally a network or a syndicator, in order to obtain retransmission consent. Thus, retransmission consent, when authorized, will be reflected in programming licensing

^{29/} The FCC indicates that it does not intend to "regulate every detail of the terms or conditions of the [retransmission] authority granted." NPRM at ¶ 57. The imposition of these requirements would not unduly interject the FCC into private negotiations between an originating station and the cable operator. Under Viacom's proposal, the certification would not be a negotiating point; rather, it would be a precondition to the execution of any retransmission consent agreement between the originating station and the operator, and by itself would not require any mediation by the FCC.

contracts between the broadcasting station and the video programmer from which the station obtains programming. The statutory language quoted above makes it clear that it is those contracts to which one must look in determining whether the station has the required authority. There may be several different parties who are "copyright holders" of the particular program.^{30/} Clearly, Congress did not contemplate that the contracts involving all parties that may own a copyright interest in the programming must be examined; rather, Congress intended the only relevant contract to be that between the station and the video programmer. The particular video programmer with whom the station contracts may or may not own a copyright interest in that programming. The FCC should therefore specifically rule that, in determining whether the station has the requisite authority to grant retransmission consent under Section 325, one need only look at the contract the station itself has entered into with each of the video programmers from which it has obtained programming.^{31/}

^{30/} See 17 U.S.C. Section 101 (definition of "copyright owner"); 17 U.S.C. Section 106; 17 U.S.C. Section 201(d); H.R. Rep. No. 1476, 94th Cong. 2d Sess. at 61, 123 (1976). As the foregoing provisions and their legislative history indicate, copyright is divisible and may be held by more than one party.

^{31/} Retransmission consent is not a copyright matter. Rather, it is a matter of communications law. As stated in Section 325(b)(6), "Nothing in Section 325(b) shall be construed as modifying the compulsory copyright license established in [the Copyright Law]...." The Senate Report further states:

(continued...)

Viacom further submits that the FCC should require explicit language conveying retransmission consent rights in a contract between a station and its video programmer before the station is authorized to grant retransmission consent.^{32/} It should adopt such a requirement for at least three reasons. First, any other requirement will result in a presumption imposed by the FCC that silence means consent; such a presumption would be a substitute for the bargain negotiated by the parties. There is no basis for any FCC presumption in this area, particularly with respect to existing contracts that were entered into before the parties even knew that Congress was considering adopting retransmission consent. Even when parties knew that a retransmission consent provision was being considered by the Congress, their silence on the issue may have reflected a determination to complete a

^{31/} (...continued)

The Committee is careful to distinguish between the authority granted broadcasters under the new Section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal.

Senate Report at 36.

^{32/} The FCC currently requires programming contracts to contain express language granting a television station network non-duplication or syndicated exclusivity rights before the station may exercise those rights on a cable system. 47 C.F.R. Sections 76.92 and 76.151. Similar language should be required for retransmission consent, such as "The licensee shall, by the terms of this contract, be entitled to grant retransmission consent to cable systems under Section 325(b) of the Communications Act, as provided in Section ____ of the FCC rules."

negotiation and leave resolution of the retransmission consent issue to another day. There is no basis for the FCC to presume what contracting parties may have intended when they did not specifically deal with retransmission consent in their contract. Imposing such a presumption has the very result of affecting their contract, which is prohibited by Section 325(b)(6). The FCC thus lacks statutory authority to adopt any such presumption.

Second, applying the FCC's proposed presumption could cause economic injury to a station's video programmers, and particularly those that have licensed programs on a barter basis. Those video programmers have made audience projections based on their outstanding contracts and have sold barter advertising based on those projections. A station electing retransmission consent may determine that any loss of audience resulting from such an election will be offset by the retransmission consent fees that can be negotiated. But what about the video programmer? If the FCC assumes a grant of retransmission consent authority because of contractual silence, the program may draw fewer viewers because it is not carried on all local cable systems, which may in turn require the station's video programmer to provide refunds or make-goods to advertisers. While the station may recoup, and in fact exceed, any reduced revenues from diminished viewing audiences, the video programmer with an existing licensing agreement with the station might not be able to negotiate with the station for a share of the retransmission consent fees. This result would be doubly unfair to the video

programmer, and the FCC should not make a presumption about the intent of the parties when the presumption can have such an adverse effect.

Finally, a requirement that retransmission consent rights be explicit will minimize disputes about the intent of the parties. For example, many syndication agreements, including many that were executed before Congress began considering retransmission consent, contain provisions limiting the station to broadcasting the programming covered by the agreement from the originating and existing transmitter and antenna of the station and prohibiting the station from charging or receiving consideration from any party who retransmits the programs over other types of facilities, including cable systems. While Viacom believes that these types of provisions evidence an intention not to authorize retransmission consent because they limit any type of retransmission of a station's signal, it is not clear whether the FCC will find them sufficiently explicit. In any event, such language, which Viacom believes is common in syndication contracts throughout the television industry, could be the subject of considerable litigation unless the FCC adopts a proposal such as Viacom's, which requires a explicit authorization for retransmission consent. Such a requirement would also be the most effective way to implement Congressional intent that retransmission consent not affect licensing agreements between stations and video programmers.

D. The FCC Should Implement Retransmission Consent and Must-Carry by Adopting Election Requirements that Will Permit Cable Operators to Minimize Costs and Prevent Disruption to Cable Service.

The FCC states that it seeks "to define the [retransmission consent/must carry] election process in a manner that will allow broadcasters and cable operators to make a relatively smooth transition from the current regulatory regime to that of the 1992 Act." NPRM at ¶ 50. Accordingly, the FCC seeks comment on when a station must elect between retransmission consent and must-carry, and on the degree of flexibility the FCC has under the 1992 Act to require stations to make their initial election earlier than the final deadline stated in the Act (i.e., October 6, 1992). Id. Also, the FCC proposes to require new stations to make their election within thirty days of commencing operations, with the election not becoming effective until 60 days after it is made. Id. at ¶ 52.

Viacom submits that a station's election between retransmission consent and must-carry, if not made at the proper time, will result in unnecessary costs and equally unnecessary disruption to cable service. For instance, the FCC recognizes that under the Copyright Law, a signal is treated as carried for a full six-month copyright accounting period even if it is carried for only part of the period. NPRM at ¶ 50. Where a local station elects retransmission consent but is not carried, a cable operator might elect to import a distant station as a substitute. If the election deadline is not sufficiently in advance of the

next following copyright accounting period so as to allow completion of negotiations with the local station, the cable operator will not know until the middle of the accounting period that it may have to add a distant station if it chooses to preserve existing program services. In that case, the cable operator will pay full distant signal fees for the distant station (often at the 3.75% penalty rate) even though the distant station was carried for only part of the accounting period.

Furthermore, to the extent that a station's election requires the cable operator to reposition or drop local stations, the FCC must account for the fact that under the Act the cable operator must give local commercial and noncommercial stations 30 days notice prior to repositioning or deletion (See Sections 614(b)(9) and 615(g)(3)).^{33/} In addition, local commercial stations may not be dropped or repositioned during a "sweeps" period (Section 614(b)(9)), and a franchising authority may require the cable operator to provide the authority with 30 days advance written notice of any change in channel assignment or in the video programming service provided over any such channel (Section 624(h)(1)).

The FCC must also consider that cable operators themselves will require some advance notice of the election in order to initiate any necessary changes to channel lineup cards, program guides and promotional material. Where a station's election will

^{33/} In the case of local noncommercial stations, such notice must also be provided to subscribers.

result in repositioning or deletion of a cable network (assuming such repositioning or deletion would not violate the network's affiliation agreement with the cable operator), the network must also receive advance notice of the election in order to evaluate whether it may be required to provide refunds or make-goods to its advertisers, whether it should revise its advertising rates, and whether its program licensing agreements can or should be modified or terminated.

Viacom submits that cable systems and cable networks will not be able to complete these tasks without substantial disruption to their own operations, and to their service to cable subscribers, unless the FCC requires local television stations to make their elections well in advance of the date on which they must be carried. Accordingly, Viacom submits the following proposal. The FCC should require local commercial television stations to make their initial election between must-carry and retransmission consent by no later May 1, 1993, and should make any must-carry or retransmission consent rules it adopts effective no earlier than January 1, 1994. This will give the cable operator eight months notice of each station's election, thereby allowing the operator sufficient time to (i) negotiate with local stations electing retransmission consent and, where no agreement can be reached, provide for any substitute signals it may choose to add at the beginning of the first copyright accounting period of 1994; (ii) determine what signals need to be repositioned or dropped, and provide any required notices to

stations, subscribers, cable networks, and franchising authorities; and (iii) reposition or drop any affected stations prior to commencement of first copyright period of 1994. For the same reasons, Viacom further recommends that May 1 and January 1 be the triennial election and effective dates for all subsequent elections under Section 325(b)(3)(B).

In addition, Viacom believes that the FCC's notification and election proposals for new stations also provide inadequate notice to cable systems. Viacom therefore proposes that the FCC require a new local commercial station to notify a cable system of its election no later than one year prior to the date on which the station expects to go on the air. In order to insure that the cable system is apprised of the inevitable changes in station construction plans and schedules after the station makes its election, the FCC should require the station to provide the cable system with an update every three months advising the system of the status of station construction and the current projected date for commencement of operation. If a new station fails to provide any of its quarterly updates, the system should not be required to carry the station any earlier than six months after the day on which the next quarterly update is provided. In no event should a cable system be required to carry a new station before the commencement of the first copyright accounting period that commences on or after the station begins operation.

Finally, for the reasons set forth in Section II, supra, Viacom requests that the FCC declare that under no circumstances

will a cable operator be authorized to abrogate any existing affiliation contract it may have with a cable network where a station's election of must-carry would affect any carriage or positioning rights bargained for in the contract. An existing affiliation contract should retain priority over a station's must-carry rights until the contract expires by its terms.

E. The FCC Must Fully Account for Retransmission Consent Costs When Establishing a "Reasonable Rate" for Basic Cable Service.

Viacom agrees with the FCC's conclusion that any fees paid or other valuable consideration granted by cable operators in exchange for retransmission consent clearly qualify as "direct costs . . . of obtaining, transmitting, and otherwise providing signals carried on the basic service tier." NPRM at ¶ 68. Therefore, regardless of the rate regulation model the FCC adopts in its pending rule making on regulation of basic service rates, Section 623(b)(2)(C)(ii) of the Act (47 U.S.C. Section 543(b)(2)(C)(ii)) requires that those costs be taken into account in determining the basic service rate. Viacom believes that when the FCC takes those costs into account it should permit their full recovery from the basic service rate, but since allowing for pass-throughs while assuming reasonable rates can be easily achieved, Viacom agrees with the FCC that the matter should be addressed in more detail in the rulemaking proceeding proposing to adopt regulations to implement rate regulation.

IV. MUST-CARRY.

A. Substantial Duplication Standard for Noncommercial and Commercial Stations.

1. Noncommercial Stations.

Section 615(b)(3)(C) of the Act provides that where a cable system with 13 to 36 usable activated channels carries a qualified local noncommercial television station affiliated with a State public television network, the system shall not be required to carry the signal of another qualified local noncommercial educational television station affiliated with the same State network if the station's programming is "substantially duplicated" by the State network station already carried. Under Section 615(e), a cable system with more than 36 usable activated channels that is required to carry three qualified local noncommercial educational television stations shall not be required to carry the signals of additional qualified local noncommercial stations whose programming substantially duplicates the programming of stations already carried.

The FCC proposes that a qualified local noncommercial station be deemed to "substantially duplicate" the programming of another qualified local noncommercial station if more than 50% of its weekly prime time programming consists of programming aired on the other station. NPRM at ¶ 12. The FCC notes that its proposal is based on the existing definition of "unduplicated broadcast television signal" in Section 76.33(a)(2) of the FCC's

Rules, 47 C.F.R. Section 76.33(a)(2). The Note to Section 76.33(a)(2) states:

For purposes of this section, "unduplicated broadcast television signal" is defined as one which does not simultaneously duplicate more than 50 percent of another signal's weekly prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n).

Viacom therefore assumes that for purposes of defining "substantial duplication" under the FCC's must carry rules for noncommercial stations, the FCC is proposing to adopt the definition of "prime time" set forth in Section 76.5(n), i.e., 6-11 p.m. (5-10 p.m. in the central time zone).^{34/}

Viacom does not support any use of the Section 76.5(n) definition of "prime time" for purposes of determining "substantial duplication,"^{35/} and instead urges that the FCC adopt a "four-hour" definition of "prime time," i.e., 7-11 p.m. Eastern and Pacific time and 6-10 p.m. Central and Mountain time.

^{34/} Under Section 76.5(n) stations in the Mountain Time Zone are presumed to have elected the 6 to 11 p.m. time period as their "prime time" unless they affirmatively elect the 5 to 10 p.m. time period.

^{35/} The only current application of the prime time definition set forth in Section 76.5(n) is, as described above, in Section 76.33(a)(2), which is used in determining whether a signal is unduplicated for the purpose of determining whether the FCC's effective competition standard is applicable. Since the Act replaces the FCC's effective competition standard with one of its own, the substantial duplication test now in Section 76.33(a)(2) will presumably be repealed when the FCC adopts rules implementing the rate regulation provision of the Act. Section 76.5(n) can then be deleted or modified without affecting any other regulatory requirements. The FCC is thus free to select a definition of prime time without concern for how it might affect any other area of cable television regulation.

This is the same definition of prime time contained in Section 73.662(g) for purposes of the FCC's prime time access rule. Its use is appropriate here because it focuses on the four evening hours when stations compete in providing their most popular programming. The 6-7 p.m. time period is normally reserved for news and traditionally has not been considered part of a station's prime time schedule. Although the definition of "prime time" in Section 76.5(n) adds a fifth hour, the FCC has recognized that a television station reaches its greatest audience during the 7-11 p.m. time period. See United Community Antenna Systems Inc., 75 F.C.C.2d 448, 456 (1979).

Section 615(e) of the Act, which specifically addresses duplication of noncommercial stations unaffiliated with a State network, provides that "[s]ubstantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services." The Act's legislative history reflects that in adopting Section 615(e) Congress intended that the FCC "adopt objective [duplication] criteria that avoid subjective judgments." Senate Report at 89. Accordingly, Viacom recommends that the FCC adopt a rule specifying that any qualified local noncommercial television station will be deemed to "substantially duplicate" any other qualified local noncommercial station if more than 50% of its programming either in prime time or during the entire broadcast day consists of programming aired on the other station. The addition of an alternate test looking to the entire broadcast

day will insure that the substantial duplication test applies not only to stations with substantial duplication in prime time hours, but also to stations with 50% or more duplicative programming even if duplication in prime time hours does not reach 50%.

Further, Viacom submits that by applying its proposed 50% prime time or "entire broadcast day" duplication standard to all noncommercial stations (State network or otherwise), the FCC will maximize the diversity of noncommercial educational programming provided to cable subscribers while avoiding subjective judgments as to whether different standards are required for network and non-network noncommercial stations. To account for variations between programming schedules, Viacom recommends that the FCC also declare that for purposes of the 50% test duplication of programming need not be simultaneous. The FCC's network non-duplication rules, applicable to both commercial and noncommercial stations, and its syndicated exclusivity rules are applicable to non-simultaneous programming and there is no reason why substantial duplication should be determined by a different standard.

Viacom also submits that a workable procedure for resolving substantial duplication issues would be to allow a cable operator to delete or deny carriage of any qualified local noncommercial station upon a prima facie showing by the cable operator that the station has "substantially duplicated" another qualified local noncommercial station carried by the operator during the previous

calendar month. The cable operator would provide its showing to the station in writing within 30 days of receiving the station's request for carriage. In order to insure that a one month showing is typical of a station's normal programming, stations either already carried or requesting carriage could be permitted to rebut the cable operator's prima facie showing by demonstrating that they have not substantially duplicated the other station's programming for the previous six calendar months.^{36/} A cable system not able to make a prima facie showing based on the previous calendar month would also be permitted to rely on the station's programming for the prior six calendar months instead of only the prior calendar month.

2. Commercial Stations.

Section 614(b)(5) of the Act states that the must-carry provisions of the Act applicable to commercial stations shall not require carriage of any local commercial station that substantially duplicates the signal of another commercial station carried on a cable system. Viacom asks the FCC to declare that a commercial television station will be deemed to "substantially duplicate" another commercial television station (network or independent) if during the immediately preceding "sweeps" period

^{36/} Since prospective programming schedules are subject to change and therefore require constant monitoring for substantial duplication, the use of the previous six months programming schedules rather than prospective programming schedules will avoid subjective judgment about whether qualified local noncommercial stations "substantially duplicate" each other.

the station broadcast at least 50% of the other station's programming either in prime time (as defined in Section 76.662(g) of the FCC's Rules) or during the entire broadcast day. Viacom submits that reference to "sweeps" periods is particularly appropriate for commercial stations because those are the periods when network prime time programming is most likely to be cleared (thereby providing cable systems with a more accurate measure of duplication between local network affiliates) and when independent stations are seeking to maximize their audiences. Substantial duplication will thus be determined based on the programming stations deem to be most effective in securing viewers. The sweeps period is also a convenient time for determining substantial duplication because cable systems cannot delete stations during these periods in any event. Finally, Viacom recommends tht the alternative duplication standard of 50% of the entire broadcast day should apply in other situations where the 50% test is met on an overall basis but not in prime time.

B. Cable Systems Serving Communities in More than One Television Market and Changes in ADI's.

The FCC has requested comment on how its must-carry rules should apply to a situation where a cable system serves communities in more than one ADI. NPRM at ¶ 17. Viacom submits that the best way to handle such a situation is to allow the cable operator the option to treat its entire cable system as being located in, and subject to the must-carry rules applicable

to, the ADI in which the largest number of the system's subscribers reside. Under no circumstances should the FCC require that a cable system serving communities in more than one ADI comply simultaneously with different signal carriage obligations applicable to communities in different ADI's. Such a requirement would in many cases require cable operators to separate systems that are technically integrated. Aside from the cost involved, such a result could delay the implementation of technological advances dependent on economies of scale, such as addressability, compression, high definition television, and the like. To the extent that separation of systems is an impediment to improved customer services, involuntary separation of technically integrated systems by virtue of the FCC's must-carry rules could also result in subscriber and franchising authority dissatisfaction.

Finally, Viacom notes that Section 614(h)(1)(C) of the Act requires that the FCC, following a written request, in appropriate circumstances add communities to or exclude communities from an ADI. The FCC requests comment on a proposal to allow either a broadcast station or a cable operator to file the written request. NPRM at ¶ 19. Viacom supports the proposal, subject to the caveat that, as proposed above, a cable operator whose system serves more than one ADI may treat its system as serving the ADI where the system has the largest number of subscribers without requesting addition or exclusion of communities to or from any ADI. By allowing cable operators to